

Stephen H.M. Bloch #7813
Tiffany Bartz # 12324
SOUTHERN UTAH WILDERNESS ALLIANCE
425 East 100 South
Salt Lake City, UT 84111
Telephone: (801) 486-3161

Walton Morris, *pro hac vice*
MORRIS LAW OFFICE, P.C.
1901 Pheasant Lane
Charlottesville, VA 22901
Telephone (434) 293-6616

Sharon Buccino, *pro hac vice*
NATURAL RESOURCES DEFENSE COUNCIL
1200 New York Ave., NW, Suite 400
Washington, DC 20005
Telephone: (202) 289-6868

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

UTAH CHAPTER OF THE SIERRA CLUB,
et al.,

Petitioners,

Docket No. 2009-019
Cause No. C/025/0005

DIVISION OF OIL, GAS AND MINING,

Respondent, and

ALTON COAL DEVELOPMENT, LLC, and
KANE COUNTY, UTAH,

Intervenors-Respondents.

PETITIONER'S MEMORANDUM IN SUPPORT OF THEIR MOTION IN LIMINE

Utah Chapter of the Sierra Club ("Sierra Club"), Southern Utah Wilderness Alliance ("SUWA"), Natural Resources Defense Council ("NRDC"), and National Park Conservation Association ("NPCA")(collectively, "Petitioners") have moved this Board to enter an order

prohibiting the Division of Oil, Gas and Mining (“the Division”), Alton Coal Development, LLC (“ACD”), or Kane County, Utah (“Kane County”), (collectively, “Respondents”) from introducing or attempting to introduce evidence to contradict, conflict with, or augment the Division’s testimony in its Rule 30(b)(6) deposition establishing each of the following facts:

1. the water quality standard for total dissolved standards (“TDS”) applicable to all streams in Coal Hollow is 1,200 milligrams per liter (*Transcript of the Deposition of the Division of Oil, Gas & Mining* (“Division Tr.”), Vol. II at 386);
2. the material damage criterion that the Division established for TDS in the CHIA for ACD’s mine is less stringent than the applicable Utah water quality standard for TDS in the same waters (Division Tr. Vol. II at 387);
3. the Division’s sole basis for establishing a material damage criterion for TDS that is less stringent than the applicable Utah state water quality standard is the Division’s status as regulatory authority with respect to Utah’s approved state program for implementing the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 (“SMCRA”) (Division Tr. Vol. II at 387-88);
4. in specifying a material damage criterion for TDS that is less stringent than the applicable Utah water quality standard, the Division relied solely on actual water samples taken from the stream portions adjacent to the permit area, the results of which are recorded in the Division’s hydrologic data base for the Coal Hollow mine (Division Tr. Vol. II at 388-89, 406); and
5. one of the two sample results on which the Division relied in specifying a material damage criterion for TDS of 3,000 milligrams per liter is an invalid datum (Division Tr. Vol. II at 398).

This memorandum presents Petitioners' legal argument in support of their motion in limine.

BACKGROUND

Petitioners motion in limine is grounded on their right under Rule 32(a)(2) of the Utah Rules of Civil Procedure to use testimony obtained during the deposition of the Division pursuant to Rule 30(b)(6) of those Rules as evidence at the hearing of this matter, together with federal case law establishing Petitioners' concomitant right to insist that neither the Division nor either of the other Respondents impair the right to use testimony from the Division's deposition as evidence by presenting or attempting to present other evidence which contradicts, conflicts with, or augments the Division's deposition testimony on the facts enumerated in the instant motion. Pursuant to this Board's order implementing the parties' discovery plan, Petitioners issued notice of the Division's Rule 30(b)(6) deposition to each of the Respondents. Petitioners then duly took the Division's deposition, at which the Division presented witnesses to testify on each of the subjects enumerated in Petitioners' notice. Counsel and lay representatives for ACD were present. Kane County elected not to attend. The portions of the Division's testimony pertinent to this motion are attached as Exhibit 1 to this memorandum.

ARGUMENT AND AUTHORITIES

Because Petitioners adhered to the requirements of Rule 30(b)(6) in providing notice of, and conducting, the Division's organizational deposition, and because the Division duly designated witnesses who provided the testimony cited above on the Division's behalf, there are no circumstances which render it impossible to apply case law construing the use of depositions taken pursuant to Rule 30(b)(6) in determining the effect of the Division's organizational deposition on the Respondents' ability to introduce contradictory or conflicting evidence at hearing.

Although Petitioners have found no Utah case law on point, the United States District Court for the District of Columbia has held that, under Rule 30(b)(6), an organization's duty "to prepare its designee to be able to give binding answers" on its behalf means that:

Unless it can prove that the information was not known or was inaccessible, a corporation cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition.

Rainey v. American Forest & Paper Assn., Inc., 26 F.Supp.2d 82, 94 (D.D.C. 1998), citing *inter alia*, *United States v. Taylor*, 166 F.R.D. 356, 362 (M.D.N.C. 1996).¹ Although the controversy in *Rainey* concerned the admissibility of an affidavit at the summary judgment stage of that litigation, where the affidavit contradicted a party's testimony in its Rule 30(b)(6) deposition, there is no reason to apply a different principle here, where the issue is whether to received contradictory testimony at hearing. In both instances, the potential to undermine the purposes of Rule 30(b)(6) is the same.

The *Rainey* court explained that Rule 30(b)(6) "aims to prevent a corporate defendant from thwarting inquiries during discovery, then staging an ambush during a later phase of the case." *Rainey v. American Forest & Paper Assn., Inc.*, 26 F.Supp.2d at 95 (citation omitted). The *Rainey* court noted that "[t]his objective guides operation of the rule irrespective of whether the corporate party has improper motives." *Id.* Speaking finally on the subject, the *Rainey* court held that:

The cure for this violation should not be simply to give plaintiff a chance to depose Ms. Kurtz [who proffered a different account of pertinent facts than those stated in the Rule 30(b)(6) deposition at issue]. If such were the remedy, corporate parties would have every incentive to "bandy" or attempt "trial by ambush," as the only downside to their strategy would be that their adversary might eventually procure access to their theretofore-concealed witness. This incentive structure would

¹ The decision in *Moore v. Summers*, 113 F.Supp.2d 5, 28 (D.D.C. 2000), among other authorities, establishes that a governmental agency (in *Moore*, the Secret Service) is under the same obligation as a corporation in providing a deposition pursuant to Rule 30(b)(6).

eviscerate the force of Rule 30(b)(6), and would delay litigation, heighten suspicions, and obfuscate the discovery process. Rule 30(b)(6) was designed to prevent such consequences, and in order to adhere to its terms, it is improper to consider the Kurtz affidavit for purposes of plaintiff's motion for summary judgment.

Id. at 96.

The *Rainey* decision has been followed in *Moore v. Summers*, 113 F.Supp.2d at 28 (refusing to consider “either contradictory information or new information that could have been provided by the agency designee” in a Rule 30(b)(6) deposition) and cited with approval in *Wilson v. Lakner*, 228 F.R.D. 524, 530 (D. Md. 2005) (“depending on the nature and extent of the obfuscation, given by the non-responsive deponent (*e.g.* “I don’t know”) may be deemed ‘binding on the corporation’ so as to prohibit it from offering contrary evidence at trial”) (citations omitted). Moreover, the *Rainey* decision is entirely consistent with the principle that – even outside the context of Rules 30(b)(6) and 32(a)(2) – a party’s sworn affidavit in opposition to summary judgment cannot create a genuine dispute of material fact by contradicting that party’s prior deposition testimony. *Halperin v. Abacus Technology Corp.*, 128 F.3d 191, 198 (4th Cir. 1997).

Petitioners are aware of the contrary holding in *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001). Petitioners respectfully submit that the better, more fully reasoned, and more applicable interpretation of Rule 30(b)(6) is that stated in *Rainey*, *Taylor*, *Wilson*, and (by analogy) *Halperin*.

CONCLUSION

Because the Division has declined to submit certain issues on cross-motions for summary disposition, Petitioners believe it possible that in the absence of an order prohibiting such conduct, the Division may proffer evidence at the hearing which contradicts, conflicts with, or augments the agency’s prior account of facts identified above. In the interest of an orderly hearing that accords

proper significance to the Division's organizational deposition, Petitioners urge the Board to make clear that, absent a showing that conflicting or supplemental information concerning the facts enumerated in the instant motion "was not known or was inaccessible" to the Division at the time of its organizational deposition, the Division may not proffer such information at the hearing of this matter.

Dated: April 19, 2010

Respectfully submitted,

By:  **Stephen
Bloch**

Digitally signed by Stephen Bloch
DN: cn=Stephen Bloch, c=US
Date: 2010.04.19 10:03:28 -0600

Attorneys for Utah Chapter of the
Sierra Club, *et al.*.

Stephen H.M. Bloch #7813
Tiffany Bartz #12324
SOUTHERN UTAH WILDERNESS
ALLIANCE
425 East 100 South
Salt Lake City, UT 84111
Telephone: (801) 486-3161

Walton Morris *pro hac vice*
MORRIS LAW OFFICE, P.C.
1901 Pheasant Lane
Charlottesville, VA 22901
Telephone (434) 293-6616

Sharon Buccino *pro hac vice*
NATURAL RESOURCES DEFENSE
COUNCIL
1200 New York Ave., NW, Suite 400
Washington, DC 20005
Telephone: (202) 289-6868

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of April, 2010, I served a true and correct copy of
PETITIONER'S MEMORANDUM IN SUPPORT OF THEIR MOTION IN LIMINE to each
of the following persons via e-mail transmission and United States first-class mail, postage pre-paid:

Denise Dragoo, Esq.
James P. Allen, Esq.
Snell & Wilmer, LLP
15 West South Temple, Suite 1200
Salt Lake City, UT 84101
ddragoo@swlaw.com
jallen@swlaw.com

Bennett E. Bayer, Esq. (*Pro Hoc Vice*)
Landrum & Shouse LLP
106 West Vine Street, Suite 800
Lexington, KY 40507
bbayer@landrumshouse.com

Steven Alder, Esq.
Utah Assistant Attorney General
1594 West North Temple
Salt Lake City, UT 84114
stevealder@utah.gov

Michael Johnson, Esq.
Assistant Attorney General
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, UT 84114-0857
mikejohnson@utah.gov

Jim Scarth, Esq.
Kane County Attorney
76 North Main Street
Kanab, UT 84741
mackeybridget@hotmail.com

Stephe
n Bloch

Digitally signed by
Stephen Bloch
DN: cn=Stephen
Bloch, c=US
Date: 2010.04.19
10:03:01 -06'00'

EXHIBIT 1

In The Matter Of:
Utah Chapter of the Sierra Club v.
Division of Oil, Gas and Mining

Vol. II
February 25, 2010

Q & A Reporting, Inc.
1872 South Main Street
Salt Lake City, Utah 84115
801.484.2929

1 the subject.

2 But go ahead and answer the question if you can.

3 A. Yes.

4 Q. You agree there is no such exception?

5 MR. ALDER: Would you restate the question? I
6 wasn't listening.

7 Q. Does the division agree that the regulatory
8 authority which establishes Utah water quality standards has
9 not adopted a less stringent, site-specific criterion for
10 total dissolved solids in any water resource that ACD's mine
11 may affect?

12 MR. ALDER: Objection as to knowledge and
13 foundation of the witness.

14 Q. If you know.

15 A. To the best of my knowledge, there is no different
16 standard.

17 Q. All right. Does the division agree that the water
18 quality standard for TDS applicable to all streams in Coal
19 Hollow is 1,200 milligrams per liter?

20 A. Yes.

21 Q. What material damage criterion for TDS did the
22 division specify in its CHIA for ACD's mine? By CHIA, let
23 me state for the record, I mean cumulative hydrologic impact
24 assessment. May we call that a CHIA from here on out?

25 A. Yes.

1 Q. Do you remember the question or shall I --

2 A. I remember. And I believe the number is 3,000
3 parts per million or milligrams per liter.

4 Q. Does the division agree that its material damage
5 criterion for TDS and the CHIA for ACD's mine is less
6 stringent than the applicable Utah water quality standard
7 for TDS in the same waters?

8 MR. ALDER: Objection.

9 A. Yes.

10 Q. On what legal bases did the division rely in
11 specifying a material damage standard for TDS that is less
12 stringent than the applicable Utah water quality standard
13 for that parameter?

14 MR. ALDER: Objection as to the legal --

15 A. It is an apples-oranges question. The material
16 damage criteria is not related to Utah water quality
17 standards. Utah water quality standards are for pollution
18 control.

19 The material damage standard is what is specific
20 for this site as to when the division would make a
21 determination of material damage.

22 Q. If I understand your testimony correctly, it is
23 the division's position that it has the authority -- has the
24 regulatory authority under the coal mining reclamation
25 program to choose a less stringent material damage criterion

1 for TDS or other parameters than those specified as Utah
2 water quality standards?

3 A. Yes.

4 MR. ALDER: Objection to the characterization of
5 prior testimony.

6 MR. MORRIS: Did you get the witness' answer?

7 THE REPORTER: I did. "Yes."

8 Q. Is there any other legal basis or bases on which
9 the division --

10 MR. ALDER: Same objection.

11 Q. -- relied in specifying a less stringent TDS
12 criterion, material damage criterion?

13 A. No.

14 Q. On what factual bases did the division rely in
15 specifying a material damage standard for TDS that is less
16 stringent than the applicable Utah water quality standard
17 for that parameter?

18 A. The division relied on actual water samples taken
19 from the stream portions adjacent to the permit area.

20 Q. Which water samples? Or which -- start at the
21 beginning. Which group of water samples or groups?

22 A. Okay. What do you mean by "groups"?

23 Q. Well, I will ask it more directly if I can.

24 A. Okay.

25 Q. Are some of the water samples to which you are

1 referring those contained in the division's hydrologic
2 database for the coal mine permit?

3 A. Yes.

4 Q. Coal Hollow Mine permit.

5 Are there any other water samples upon which the
6 division relied?

7 A. That are not in the database?

8 Q. Yes.

9 A. No.

10 Q. Okay. What is the total number of samples for
11 which ACD reported TDS concentration in its baseline
12 hydrologic data for surface water?

13 A. The total number of samples?

14 Q. Yes.

15 A. I have not counted.

16 Q. If I suggested to you that it is 86, would you
17 find that an acceptable number, or would you like to count?

18 A. It sounds reasonable.

19 Q. What is the mean value for all TDS concentrations
20 that ACD reported in its baseline hydrologic data for
21 surface water?

22 A. I don't know.

23 Q. Did the division calculate the mean reported TDS
24 value before setting the material damage criterion for TDS?

25 A. I don't know.

1 A. It's a sample or value that does not follow the
2 trend, that does not fall within the statistical norm.

3 Q. What use, if any, may a hydrogeologist properly
4 make of an outlier result in forming opinions concerning a
5 particular set of data?

6 A. It's limited. Outliers should never be ignored
7 because often they are the most significant data -- value in
8 the data set. But as far as forming general ideas, general
9 opinions, they generally should be approached with caution,
10 if not ignored.

11 Q. There are outliers that are, from all testing one
12 might conduct or whatever, valid datum, and then -- would
13 you agree?

14 A. Yes.

15 Q. Would you also agree that there are outliers, like
16 the one you are looking at in the report concerning
17 March 22, 2008, TDS at monitoring station SW-6 that are
18 simply invalid data?

19 A. Yes.

20 Q. What treatment should invalid data be given?

21 A. It should be either omitted or -- probably
22 omitted, at least for most applications.

23 Q. All right. Does the division agree that the TDS
24 result on March 22, 2008, at SW-6 is not a valid datum?

25 A. Yes.

1 streams such as the streams that are on the permit area?

2 MR. MORRIS: I will object to this because I asked
3 him whether there was any other information that the
4 division considered in setting the material damage
5 criterion, and my recollection of his answer was no.

6 MR. ALDER: If that was his answer, then I will
7 withdraw the question.

8 Q. Did you hear him ask that question?

9 A. I heard his question. I didn't understand yours
10 to be quite the same question. Could you ask it again?

11 Q. I think the questions are the same. It is whether
12 there's other bases other than the data that was submitted
13 by ACD as -- that supports the TDS level for streams in the
14 permit area higher than 3,000.

15 A. No.

16 MR. ALDER: I wish I hadn't asked. I withdraw the
17 question and the answer. That's all I have.

18 EXAMINATION

19 BY MR. ALLEN:

20 Q. Two questions, please.

21 Referring to Exhibit-27, have you ever seen that
22 graph before today?

23 A. No.

24 Q. As you sit here today, do you have any way of
25 knowing which point in the division's database, if any,